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No. 86-1625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAUL G. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

Paul G. Gorman
5910 Staghorn
Toledo, Ohio 43614
(419) 867-0860

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STATEMENT

Regarding the Government's recitation of the facts, it was, understandably, selective. As in the trial and at the Court of Appeals, the government displayed the testimony of Merle Weber that Paul Gorman was a horrible government employee,

that he gave Weber grand jury testimony, that he "discussed" with Weber how to time grand jury subpoenas in order to place extra pressure on banks, that he extorted the loan from Weber, etc.

The only response to this is to restate that the testimony comes from Weber only, and as punishment for Petitioner doing his job as an Assistant United States Attorney, that is, because he terminated his inquiry of the banks which Weber, in delusion, felt owed him "retribution". The record clearly displays Weber and DeSanctis, both testifying under immunity, revealing a concerted effort, over a number of months, to place Petitioner into a, seemingly, compromising position so that they could blackmail him into prosecuting the banks which they desired to have indicted. DeSanctis' statements to Weber before the loan, advising him to make

Petitioner a loan "so we can own him", and Weber's statement to DeSanctis, after he made the loan, "now we have Gorman where we want him, I have loaned him some money", belie any attempt by the Government to portray them as persons from whom Petitioner "extorted" a loan.

The record clearly reveals that the Petitioner, with no knowledge of their scheme, accepted them as friends and simply did his job. He made a limited inquiry into the allegations, with the assistance and consent of his superior and the FBI. Finding no basis for the allegations he terminated the grand jury at the earliest possible time. He denied Weber's and DeSanctis' statement's at trial and continues those denials today.

To clarify a few points of fact brought up by the Government, the record reflects that Petitioner did not

"solicit" the loan from Weber. The trial record plainly states the testimony of DeSanctis and Weber, both testifying that Weber "volunteered" the loan to Gorman, in a purely social context, with no connection to his official position or duties.

Finally, the issue of "employment" is involved in both counts and discussed at length by the Solicitor General. The grand jury charged Petitioner under 18 U.S.C. 208 with negotiation for employment with one who had a financial interest in his official proceeding. He was also indicted for requesting or receiving the abstract gratuity of "future employment".

This was consistent with the government's analysis of 18 U.S.C. 201(g) that United States v. Williams, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983), alone controled what constituted a violation under the statute. That

analysis, basically, was that anything that a public official requests or receives, which the official determines to have "value" constitutes a violation.

The Government did not completely research the case law. If they did they would have found that the same Second Circuit that decided Williams, previously decided United States v. Umans, 368 F.2d 725 (2d Cir. 1966), and United States v. Irwin, 354 F.2d 192 (2d Cir. 1965) which interpretted the purpose of the statute to be, without question, to prohibit public officials from requesting or receiving the unauthorized compensation which is inherent in gifts and gratuities.

The Government responds only with a "straw man" agument which then proceed to knock down, suggesting that it is Petitioner's argument that only cash can stand for the "additional compensation"

inherent in gifts and gratuities under Section 201(g). This has never been the contention of Petitioner. Any item or service which can be transferred gratuitously can stand for the "anything of value" element, as well as cash.

The Solicitor General is attempting to divert the Court's attention from the true rulings of the cases cited by Petitoner, which are provided as precedent supporting the argument that Congress intended Section 201(g) to prohibit unauthorized compensation inherent in the request or receipt of gratuities. It there is no evidence of unauthorized compensation, that is, no gifts, then there is no evidence of a violation.

The Second Circuit was very emphatic when it stated that to convict an accused the government must prove that the purpose he had in making or promising a gift was to

give "additional compensation". United States v. Irwin, supra, at 197. Sections 201(f) and (g) make it criminal for a person to make a gift to an official and for the official to receive a gift, for doing something which the official is paid to do anyway. United States v. Umans, supra, at 728. See also, United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974) and United States v. Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied, 439 U.S. 870 (1978) ("The gravamen of each offense...is simply the acceptance of unauthorized compensation.")

DIVISION IN THE CIRCUITS

"1. ANYTHING OF VALUE" ELEMENT

The Solicitor General did not respond to Petitoner's first reason for granting the Writ, which was because the instant decision divides the Circuits. The Second, Fifth and D.C. Ciruits, as noted above, interpret the intent of Congress, regarding

18 U.S.C. 201(f) and (g) as existing to prohibit the request or receipt of "unauthorized compensation" in gifts. They are specific and unanimous in their rulings.

The instant decision of the Sixth Circuit, specifically holds that entering into an economic exchange, that is paying for an item in full is meritless under Section 201(g) and that the "thing of value" element is proven, when the government proves that the official reqested or received something which he perceived to have value, notwithstanding the nature of the transaction, that is a valid purchase, lease or rental.

However, a valid purchase, lease or rental, in the other Circuits, would reflect that the official did not request or receive unauthorized, additional compensation, and the government, merely proving perceived value, would not

sufficiently prove the offense.

2. "INTENT" ELEMENT

Further, the Solicitor General did not dispute that the instant decision constituted a division among the Circuits regarding the issue of general criminal intent, raised by Petitioner.

The Second and Fifth Circuits specifically warned of the danger of possible criminal prosectution for accident, misunderstanding, inadvertence or other innocent reason, when they ruled that general criminal intent was an essential element of 18 U.S.C. 201(g) which the government must sufficiently prove to sustain a conviction under the statute. United States v. Irwin, supra, at 197; United States v. Evans, supra, at 480.

In the Circuits noted above, payment for an item or service would reflect the intent not to request or receive

unauthorized compensation in the form of a gift, and the element of general criminal intent, in those Circuits, would not be proven.

In the instant decision, the Sixth Circuit acknowledged the issue on intent that Petitioner raised, however, the Panel did not rule on the issue.

It is submitted, with respect to the Panel, that it is impossible to prove an intent to receive a gratuity, or the unauthorized compensation inherent in a gratuity, where the evidence proves that the official always intended to pay for the item or service, and, in fact, did pay for it prior to it ever being questioned.

The present limbo state has Petitioner and all other public officials in the dark as to the status of the law regarding the element of intent in a 201(g) prosectution. Since the Sixth Circuit elected not to rule

on the issue, precedent from the other Circuits would appear to control.

If the rulings from the other Circuits control, then the fact that the Petitioner did not request or receive any unauthorized compensation, that is no gifts or gratuities, leads only to the conclusion that the government did not prove the requisite element of intent.

VARIANCE ISSUE - GRATUITY COUNT

The response of the Government begs the issue. If the grand jury charges that the thing of value, in this case a loan, comes from a named party, "directly or indirectly", then the proof at trial must be so sufficient as to, at least prove that the loan originated from the party named in the indictment, and went through an intermediary to the public official. If the grand jury charged that it came from Weber, whether directly or indirectly, the

proof at trial must be consistent to prove that it, indeed, came from Weber.

The Circuit ruled that Weber "arranged" the loan. The Circuit did not rule that Petitioner knew of the arrangement. The President of the bank testified that he and Weber acted througout this period to keep from Petitioner knowledge of the reason for the loan and the President testified that Petitioner qualified for the loan in every respect.

The loan came from the bank, not from Weber, directly or indirectly. The Government cannot amend the indictment to fit their evidence. Petitioner had the moral and legal obligation to repay the loan to the bank, not to Weber.

The Government makes much that the loan was "unsecured", (Opp. 12) as if this was something extraordinary. Banks, loan

companies, credit unions, and individuals make unsecured loans every day. Again, in the absence of a gratuitous request or transfer which provided Petitioner with unauthorized compensation, no violation of Section 201(g) can be sufficiently proven.

The determining factors, which the Solicitor General did not discuss, was that Petitioner, after his comviction, could have been indicted for requesting or receiving the McComb Bank loan, using the same prosecutive theory as in the first indictment, and could not have claimed former jeopardy. Finally, the government presented the McComb loan, not as coming "indirectly" from Weber (not one witness testified it came from Weber "indirectly") but as "another" gratuity from the McComb bank for which he was not entitled.

There is inherent in the circumstances the substantial likelihood that Petitioner

was convicted for receiving a gratuity from the McComb bank, a crime for which he was not indicted.

CONFLICT OF INTEREST COUNT - NEGOTIATION

The Solicitor General minimizes the requirement that a defendant may only be convicted of a crime for which he is indicted. The grand jury charged Petitioner with negotiating with Weber only. The only evidence of negotiation with Weber occured on February 12, 1983. The Government stresses that Petitoner had a discussion regarding employment with DeSanctis on August 27, 1982, however, there is no requirement in the indictment for "indirect" negotiation.

The government could have paraded 50 witnesses before the jury, but for purposes of determining whether the government sufficiently proved what the grand jury charged, only the negotiation with Weber can be considered because only negotiation

with Weber would be relevant to the indictment. Even if the DeSanctis testimony is not a variance, the fact remains that the DeSanctis conversation was not "negotiation" with Weber.

DeSanctis further testified that the August 27 discussion involved only "potential". The issue of law, which the Solicitor General elected to ignore, is whether conversations involving potential employment may rise to the level of "negotiation" for purposes of 18 U.S.C. 208.

Finally, the Solicitor General states flatly that the Circuit ruled that there was an "agreement" for employment, as evidence of negotiation. (Opp. 15, fn 10) The Court is invited to read the passage of the Opinion to find that there was no evidence of such an "agreement", there or anywhere else. Also, there was no offer,

of employment or solicitation for employment by Petitioner in the record.

OFFICIAL PROCEEDINGS

What the Solicitor General does not acknowledge is that the so-called "Hartley investigation" was really a multi-subject investigation, involving Hartley, a man named Larry Miller and several banks, which Weber desired to be prosecuted as "participants" with Hartley in the check kite scheme. Petitioner conducted his investigation of the banks from August of 1982 until January 17, 1983. He found no grounds for the allegations of criminality, advised his supervisor and the attorney for the banks and terminated the investigation on that date. Trial testimony of the attorney and the supervisor firmly establish the January 17, 1983 date.

The Circuit found Weber to have a "financial interest" in Petitioner's

investigation of the banks only. When Petitioner's investigation of the subject banks terminated, on January 17, 1983, the official proceedings in which the Circuit found Weber to have a financial interest likewise terminated. The fact that the investigation of Hartley continued after that date until April, 1983 is of no consequence because Weber was not found to have a financial interest in Hartley.

On February 12, 1983, no "official proceedings" in which Weber was found to have a "financial interest" existed. Accordingly, even if Petitioner did "negotiate" with Weber on that date, the prohibitions of 18 U.S.C. 208 would not apply because Petitioner was not conducting any "proceedings" in which Weber had an interest, financial or otherwise.

The fact of the multi-subject investigation and the fact that the

investigation of the banks being terminated prior to the February 12, 1983 meeting, was not discussed by the Solicitor General.

The point of law then, which is not disputed, is whether a public official may negotiate for employment with a former subject of a criminal investigation, after the subject has been clearly terminated as a subject. According to the Circuit's ruling, once a subject is part of another investigation, the prohibitions of Section 208 apply until the investigation of every other subject in the investigation has been brought to an end. There is no precedent for such a contention.

FINANCIAL INTEREST - KNOWLEDGE

Petitioner argued that there was no evidence of "financial interest", as that term was intended by Congress in the prosecution. The "financial interest" found by the Circuit, while displaying

Weber's concern for the outcome of the case, gave him no interest in the subject of the investigation.

The Solicitor General put it thusly: "Weber became of the OPINION that the banks participated in Hartley's check kite..." "Weber CONCLUDED that if the scheme could be proved"...he would collect. "It was Weber's HOPE that the POTENTIAL liability and attendant publicity of a criminal proceeding would stimulate the banks to settle quickly with the creditors." (Opp. 3)

The question of law before this Court is critical to every public official in this country. Does the mere "opinion", "conclusion", and "hope" of a person grant that person a "financial interest" in the proceedings of the official, as was intended by Congress in enacting Section 208? Weber did not have the "financial

interest", contemplated by Congress as interpretted by this Court in United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1960).

Congress did not intend that anyone who believes he or she will gain from a certain official proceeding has, by that belief alone, a financial interest so as to trigger the prohibitions of Section 208. If so, public officials around the country would have to read the minds of every person they may wish to negotiate with.

Of critical importance are two points:

1. There is absolutely no evidence that Weber's beliefs, hopes, conclusions or were ever communicated to Petitioner.

2. There is absolutely no evidence that Petitioner had any knowledge of the "financial interest" which was found by the Circuit, at the time of the so-called "negotiation".